

RECEIVED

July 15, 2011

JUL 18 2011

OFFICE OF THE REGIONAL ADMINISTRATOR

Curt Spalding
Regional Administrator
EPA New England
5 Post Office Square, Suite 100
Boston, MA 02109-3912

Re: St. Croix River

Dear Mr. Spalding,

On behalf of the Conservation Law Foundation (“CLF”) and its members, this letter hereby serves as a 60-day notice of intent to sue the Environmental Protection Agency (“EPA”) and Kurt Spalding, EPA Regional Administrator, Region 1, pursuant to section 505(a)(2) of the Clean Water Act (“CWA”), 33 U.S.C. § 1365(a)(2), for the failure of the EPA to perform non-discretionary duties under the CWA. Specifically, the EPA has failed to review and approve or disapprove changes to the State of Maine’s water quality standards for the St. Croix River as required under section 303(c) of the CWA. *See id.* § 1313(c)(2), (c)(3). CLF intends to file suit to obtain injunctive and declaratory relief as set forth below, in addition to any other appropriate relief, including the recovery of attorney fees and costs of litigation.

I. Legal Background

The Clean Water Act

The purpose of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” *Id.* § 1251(a); *see also S. D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 385 (2006). In order to fulfill that mandate, the CWA requires that states adopt water quality standards for their waterbodies, subject to EPA review on a triennial basis.¹ 33 U.S.C. § 1313(c)(1). Water quality standards must include three elements: (1) designated use of waterways (e.g., the protection of aquatic life and recreational uses); (2) water quality criteria, expressed as either narrative or numeric standards; and (3) an antidegradation policy that protects existing uses. *See id.* § 1313(c)(2)(A), (d)(4)(B); 40 C.F.R. § 131.10-.12.

Any change to an existing water quality standard must be consistent with the state’s antidegradation policy and must be submitted to the EPA for review. *See* 33 U.S.C. §

¹ Maine’s last submission was in 2009 and was in large part approved by the EPA in May 2010. Maine’s proposal to lower the water quality classification for a portion of Long Creek was objected to by CLF and remains under review by the EPA.

1313(d)(4)(B), (c)(2)(A).² Upon review, the EPA has a non-discretionary duty to either approve or disapprove the revisions. *See id.* § 1313(c)(3). In reviewing the revised water quality standards, the EPA must consider, among other things, “whether the state has adopted criteria that protect the designated water uses” and “[w]hether the State has followed its legal procedures for revising or adopting standards.” 40 C.F.R. § 131.5. If the EPA approves of the revised standards, the EPA must notify the state of its approval within 60 days. *See* 33 U.S.C. § 1313(c)(3). Conversely, if the EPA determines that the revised standards are not consistent with the requirements of the CWA, the EPA must notify the state of the changes required to correct the inconsistency within 90 days. *See id.* If the state fails to adopt such changes, the EPA must “promptly” promulgate new standards consistent with the CWA. *See id.* § 1313(c)(4).

Maine’s Water Quality Standards

Pursuant to section 303(c) of the CWA, *id.* § 1313(c), Maine has established four classes of water quality standards for the state’s freshwater rivers, ranging from “Class AA” waters to “Class C” waters.³ *See* 38 M.R.S.A. § 465. Larger waterbodies are segmented and may contain multiple classifications. Additionally, Maine has enacted an antidegradation policy mandating that “[e]xisting in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected.” *Id.* § 466(12).

II. Factual Background

The St. Croix River system is an international waterbody forming, in part, the boundary between the State of Maine and New Brunswick, Canada. Alewives, an anadromous species,⁴ are native to the St. Croix River and play an important ecological role in both freshwater and marine food chains and nutrient cycles. *See* Richard Dill et al., Int’l Joint Comm’n, *An Adaptive Plan for Managing Alewife in the St. Croix River Watershed, Maine and New Brunswick* 1 (2010). Although dams and water pollution have had a deleterious effect on the St. Croix alewife population since the 1860s, fish passage facilities⁵ and improved water quality in the 1980s led to a rapid increase in alewife spawning populations, with over 2.6 million fish returning in 1987. *See id.* at 1-2.

The resurgence in alewife populations coincided with a period of declining smallmouth bass populations—a non-native species—within the St. Croix watershed. *See id.* at 2. With little scientific data, some parties claimed that the decline in the population of the non-native

² *See also* EPA Water Quality Handbook § 4.4.2 (stating that “[n]o activity is allowable under the anti-degradation policy which would partially or completely eliminate any existing use whether or not that use is designated in a State’s water quality standards.”).

³ Additionally, Maine has established three classes for marine and estuarine waters, 38 M.R.S.A. § 465-B; two classes for groundwater, *id.* § 465-C; and one class for lakes and ponds, *id.* § 465-A.

⁴ An anadromous species is one that lives in saltwater but spawns in freshwater.

⁵ Prior to 1980, inadequate fish passage at the Milltown Dam—the first dam on the St. Croix River—effectively prevented alewives from migrating upstream. In 1980, a new fishway was constructed at Milltown and “coupled with state of the art fishways constructed at the Woodland and Grand Falls Dams [the next two dams on the River] allowed alewives unimpeded access to nearly all the headwaters of the St. Croix.” Lewis N. Flagg, *Historical and Current Distribution and Abundance of the Anadromous Alewife (Alosa pseudoharengus) in the St. Croix River* 1 (2007).

smallmouth bass was tied to the restoration of the native population of alewives. That claim has since been proven to be without any merit. *See id.* Nonetheless, in response to such claims, the Maine Legislature passed a bill in 1995, 12 M.R.S.A. § 6134, with the explicit purpose of blocking alewife passage at the Woodland Dam and Grand Falls Dam on the St. Croix.⁶ *See id.* The bill effectively eliminated access to alewife spawning habitat in the St. Croix watershed, and, as a direct and foreseeable result of the legislation, there was a complete collapse of the St. Croix alewife stock.⁷ *See* Dill et al., *supra*, at 2.

After a study on the dynamics between smallmouth bass and alewife populations showed no impacts of the latter on the health of the former,⁸ the Maine Legislature amended section 6134 in 2008 to allow passage at the Woodland Dam. *See* FB Env'tl., Int'l Joint Comm'n, *St. Croix River: State of the Watershed Report* 18 (2008). However, passage at the Woodland Dam restores only 2 percent of available habitat for alewives. *See id.* Accordingly, alewives have been, and continue to be, prevented from accessing 98 percent of their natural habitat in the St. Croix River above the Grand Falls Dam. *See* Dill et al., *supra*, at 2.

III. The Legislation Blocking Alewife Passage on the St. Croix River Represents a *De Facto* Change in Maine's Water Quality Standards

Under Maine's water quality standards, the St. Croix River above the Grand Falls Dam is classified as "Class A" water.⁹ By enacting section 6134 in 1995, and amending the statute in 2008, the Maine Legislature effectively changed the water quality standards for the segment of the St. Croix River above the Grand Falls Dam, making it impossible for that section of the St. Croix to meet the "Class A" water quality standards.

Maine's "Class A" water quality standards mandate both that "[t]he habitat be characterized as natural" and that "[t]he aquatic life . . . shall be as naturally occurs." 38 M.R.S.A. § 465(2).

"Natural" "means living in, or as if in, a state of nature not measurably affected by human activity." *Id.* § 466(9). "As naturally occurs" "means conditions with essentially the same physical, chemical and biological characteristics as found in situations with similar habitats free of measurable effects of human activity." *Id.* § 466(2). In contrast, Class B waters must only be "unimpaired," which means "without a diminished capacity to support aquatic life." *Id.* §§ 465(3)(A), 466(11). The alewife is a native anadromous species to the St. Croix River, requiring habitat that allows for both upstream and downstream migration. The portion of the St. Croix River above the Grand Falls Dam is designated Class A, *id.* § 467(13)(A)(1), and is unarguably

⁶ In a complaint filed against the State of Maine officials charged with implementing that statute, a group of plaintiffs have alleged that the statute violates the Clean Water Act and thus violates the Supremacy Clause. *See* Friends of Merrymeeting Bay v. Olsen, No. 1:11-cv-00167 (D. Me. filed Apr. 22, 2011). By filing this NOI, CLF takes no position on the merits of that claim nor can or should this NOI be a consideration in determining the merits of the claim.

⁷ The number of alewives returning to the St. Croix River declined from 2.6 million in 1987 to 900 in 2002. *See* Dill et al., *supra*, at 2.

⁸ The study found that alewives posed no negative effects on St. Croix smallmouth bass populations. *See* Dill et al., *supra*, at 3.

⁹ The impounded waters immediately above the Grand Falls Dam are classified as Class GPA; however, the free-flowing waters above the impoundment are classified as "Class A." *See* 38 M.R.S.A. § 467(13).

the natural habitat for that native fish. Thus, by passing legislation explicitly aimed at preventing a naturally occurring species—alewives—from accessing 98 percent of its natural habitat in the St. Croix River above the Grand Falls Dam, the Maine Legislature intentionally and effectively changed the water quality standards for that section of the St. Croix to Class B – that is, it still has the capacity to support alewives but because of the measurable effects of human activity (a dam with blocked fish passage) alewives cannot naturally access that habitat. Likewise, by blocking alewife migration to and from the waters above Grand Falls Dam, the Maine Legislature is altering the naturally occurring, physical characteristics of the St. Croix River, also a fundamental change to the water quality standards. Consequently, the culmination of the 1995 legislation and the subsequent 2008 amendment is a *de facto* change in Maine’s water quality standards. *See Miccosukee Tribe of Indians of Fla. v. United States*, No. 95-0533-CIV-DAVIS, 1998 WL 1805539, at *16 (S.D. Fla. Sept. 14, 1998) (finding that a Florida law that created an exemption from state water quality standards created a *de facto* change in water quality standards); *Miccosukee Tribe of Indians of Fla. v. United States*, No. 04-21448-CIV, 2008 WL 2967654, at *12 (S.D. Fla. July 29, 2008).

IV. The EPA Has a Non-Discretionary Duty to Review the Changes to Maine’s Water Quality Standards

A State is authorized to seek changes to the water quality standards for its waterbodies. *See* 33 U.S.C. § 1313(c)(2)(A). Section 303(c)(2)(A) of the CWA requires that *any* changes or revisions to a State’s water quality standards be submitted to the EPA for review and approval or disapproval. *See id.* If a State wishes to remove a designated use or establish sub-categories of a use requiring less stringent criteria, a State may do so provided it conducts a use attainability analysis (UAA) and seeks EPA approval. *See* 40 C.F.R. § 131.10(j); *FPL Energy Me. Hydro LLC v. Dept. of Envtl. Prot.*, 926 A.2d 1197, 1204 (Me. 2007) (Maine could not apply a less stringent standard for hydropower impoundments than the EPA-approved Class C standard without conducting a UAA and obtaining EPA approval).¹⁰

The EPA’s duty to review revised water quality standards is non-discretionary. *See Fla. Pub. Interest Research Group Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070, 1080 (11th Cir. 2004); *see also Miccosukee Tribe of Indians of Fla. v. United States*, 105 F.3d 599, 602 (11th Cir. 1997). To that end, a state’s failure to submit to EPA revisions to water quality standards “cannot circumvent the purposes of the CWA” or the obligation of EPA to review those revisions. *Id.* at 602. Thus, “[e]ven if a state fails to submit new or revised standards, a change in state water quality standards could invoke the mandatory duty imposed on the [EPA] to review new or revised standards.” *Id.*; *see also Fla. Pub. Interest*, 386 F.3d at 1089. In determining whether such a duty applies, it is the *effect* of the action in question that determines whether the standards have changed. *See Miccosukee Tribe of Indians of Fla.*, 105 F.3d at 603.

¹⁰ EPA may not approve the removal of a designated use or the application of less stringent criteria unless the State demonstrates that “attaining the designated use is not feasible” as a result of one or more of six factors. *See* 40 C.F.R. § 131.10(g)(1)–(6). If EPA were to require Maine to conduct a UAA for the St. Croix, the State would be unable to show that the Class A standards (“aquatic life...shall be as naturally occurs”) are unattainable. By unblocking the Grand Falls Dam and allowing for fish passage, the designated uses of the River would be attained.

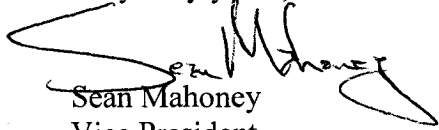
Similarly, a state's failure to follow the mandated procedures for amending its water quality standards does not absolve the EPA of its non-discretionary duty to review those revisions. *See Fla. Pub. Interest*, 386 F.3d at 1089. Rather, the state's failure to follow proper procedure is one of the very factors that the EPA must consider in reviewing the revised standards. *See* 40 C.F.R. § 131.5(a)(3) (requiring the EPA to review "[w]hether the State has followed its legal procedures for revising or adopting standards"); *see also Fla. Pub. Interest*, 386 F.3d at 1089-90 (finding the district court, in determining that a Florida rule did not change water quality standards, improperly relied on the fact that the state did not follow the proper procedures). Thus, the fact that the change to the St. Croix River's water quality standard was not based on a UAA nor effectuated by a change to the statute setting water quality standards but a separate statute is of no matter. What matters is that a change to the St. Croix River's water quality standard was made and has not been reviewed for approval or disapproval by EPA.

The legislation at issue has the effect of changing Maine's water quality standards because it explicitly aims to extirpate a natural species from a "Class A" water, and it does so by altering the natural, physical and biological characteristics of the water (i.e., blocking migratory passage). Thus, the EPA has a non-discretionary duty to disapprove these significant changes to the water quality standards for the St. Croix River. Failure to do so allows Maine to circumvent its responsibilities under the CWA and prevent EPA from fulfilling its legal obligations. Moreover, the fact that Maine changed the St. Croix River's water quality standards by codifying the revisions under a different title of the Maine Code is a strong indication that the Maine legislature was well aware that it would not be able to achieve EPA approval of the change under the CWA. Finally, even if the State were to follow proper procedure to effectuate the change it made in 1995 and reaffirmed in 2008 by conducting a UAA, there is no conceivable manner in which a UAA would meet the criteria necessary to support such a change.

V. Conclusion

The EPA has a non-discretionary duty to review and disapprove of Maine's revised water quality standards for the St. Croix River under section 303(c) of the CWA. Unless EPA performs that duty and takes steps to remedy this ongoing violation of the CWA, CLF intends to file suit at the close of the 60-day notice period pursuant to 33 U.S.C. § 1365(a) and will seek appropriate injunctive and declaratory relief, as well as a recovery of attorney fees and litigation costs as provided under the Act.

Very truly yours,



Sean Mahoney
Vice President
Conservation Law Foundation
47 Portland Street
Portland, ME 04101

